

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-1147
~~T-3104~~

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

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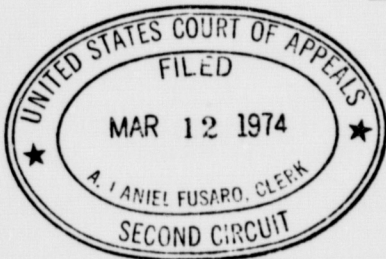
THE UNITED STATES OF AMERICA,
Appellant,

v.

ANTHONY JAMES SEBASTIAN a/k/a TONY
SEBASTIAN and PATRICK GIBBONS,
Appellees,

APPEAL FROM A SUPPRESSION ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF NEW YORK, CR. 1973-237.

APPENDIX FOR THE APPELLANT



JOHN T. ELFVIN,
United States Attorney,

ANNE M. SREBRO,
Assistant United States Attorney
of Counsel,
Attorney for Appellant,
502 United States Courthouse
Buffalo, New York 14202.



PAGINATION AS IN ORIGINAL COPY

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TESTIMONY.

Witness for Government:

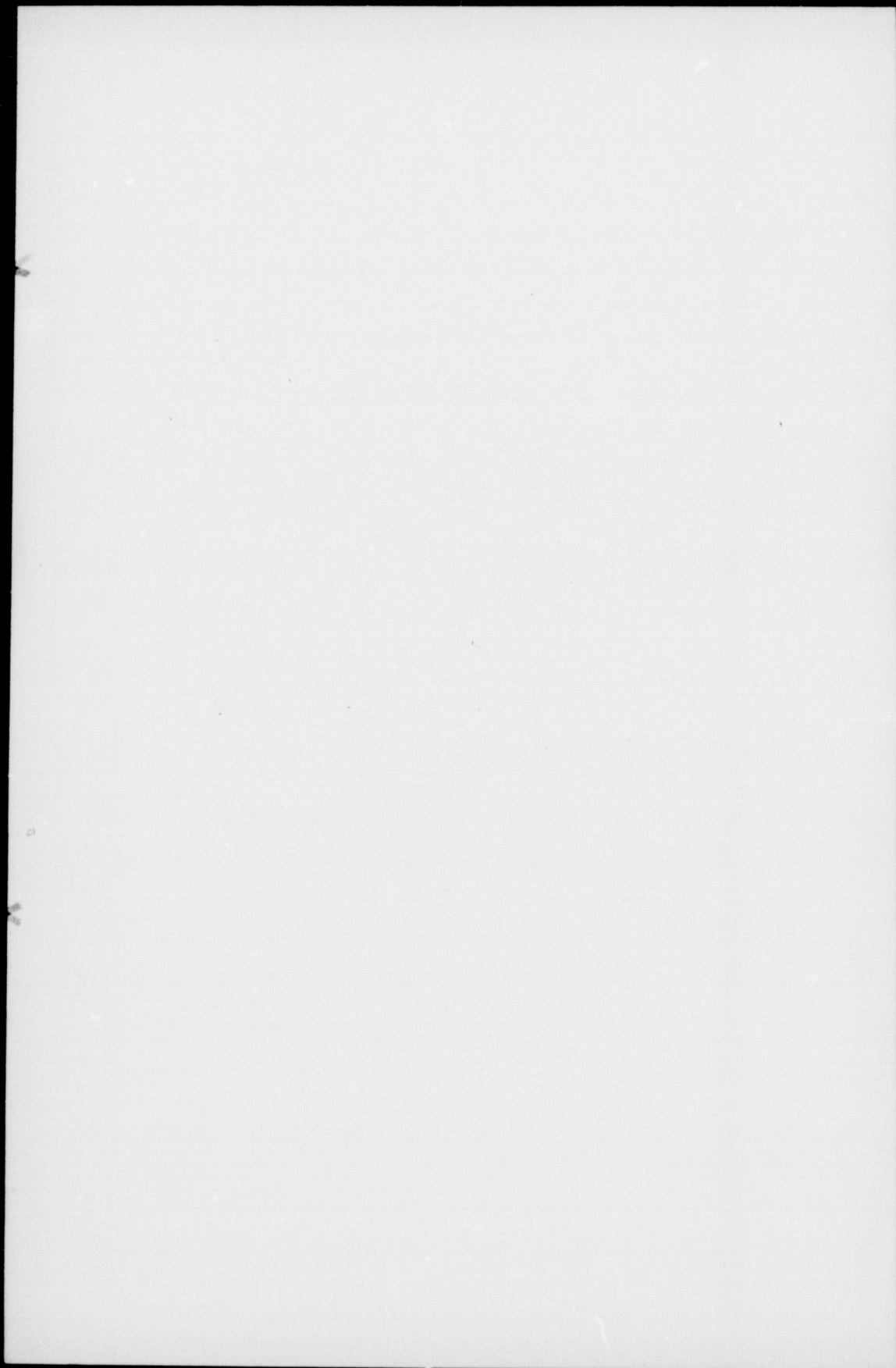
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EXHIBIT.

Court's Exhibit:

Exhibit 1—Report. Marked for identification at
page 9. Not printed.



United States District Court

WESTERN DISTRICT OF NEW YORK

THE UNITED STATES

v.

ANNETTE NUGENT, MANUEL PERDOMO, STEPHEN
E. LEVY and DANIEL A. NUGENT,
Defendants.

Criminal Docket
No. 1973-97
No. 1973-224

Excerpts from Proceedings of November 20, 1973.

Excerpt from testimony of the Witness JOSEPH A. SOLPIETRO, had and taken in proceedings before the Hon. John T. Curtin, United States District Judge, in Part II, United States Court House, Buffalo, New York, on November 20, 1973.

Appearances:

John T. Elfvin, United States Attorney, by Anne M. Srebro, Assistant United States Attorney.

Goldberg & Finger, Attorney for the Defendants Annette Nugent and Manuel Perdomo; Jack G. Goldberg, Esq., of Counsel.

George B. Doyle, Esq., Attorney for the Defendant Daniel A. Nugent.

J. A. Solpietro, for Government, Cross.

JOSEPH A. SOLPIETRO, a witness called by and in behalf of the Government, having been previously duly sworn, was examined and testified further as follows:

Cross Examination by Mr. Doyle:

Q. Mr. Solpietro, when was it that you first learned you would be testifying here today? A. I forgot the date we were up here before.

Q. That was back around October 23rd? A. Yes.

Q. You were standing by on that date ready to testify? A. Yes.

Q. And likewise then you were apprised of the fact that this hearing was adjourned until yesterday, is that correct? A. That's correct.

Q. And you have been standing by ready to testify here for the last day and a half or so? A. Beginning yesterday, that's right.

Q. Now, you appreciated and understood as an experienced narcotic agent this was an important part of the proceeding, didn't you? A. Yes, I did.

Q. Incidentally, when you were back making the plethora of mental notes that you have told us about and a few written notes that you have also mentioned to us, what were you making those notes for the purpose of? A. The notes while I was in the room?

Q. Yes. A. So I could relatively put down the approximate time things happened, the approximate things that happened while I was on surveillance.

Q. And you were recording it for that purpose so you would have a record of it? A. For myself, yes.

Q. And a lot of things were happening you wanted to get them down in writing, I assume? A. That's correct.

Q. Isn't that correct? A. Correct.

J. A. Solpietro, for Government, Cross.

Q. And I assume that you followed the old adage that one scratch of the pen is probably worth the memory of 12 men, didn't you? A. I never heard that before.

Q. In any event, you scratched out these notes as best you were able during the course of the duties that you were performing, correct? A. That's correct.

Q. And the next day in order to have a record of the events that occurred on the day before you made out one of these BD 6 forms, is that correct? A. Yes. We meet with the rest of the agents. We put our notes together, what I saw at this time, did anybody see anything before. We put it together into what we call a BND 6, BND 6 report.

Q. All right, and is this,—this, of course, is to advise your agency and your superiors of exactly what happened, isn't that correct? A. Basically, yes.

Q. And also this is a written record that is made fairly contemporaneously with the events to have a written record of what occurred, isn't that correct? A. That's right.

Q. Now, incidentally, the events we are talking about, so we are clear on that, occurred almost a year ago, didn't they? A. That's right.

Q. Now, in connection with your testimony here today, appreciating that it was an important part of the criminal proceeding you made efforts to prepare yourself for your testimony today? A. Yes, I did.

Q. And prepare yourself for your testimony on October the 23rd, is that correct? A. Yes, I did.

Q. Fine, and will you tell us, please, what steps you as a careful agent took in order to prepare yourself for your testimony? A. I reviewed the BND 6 to get the times and the dates straight.

Q. All right, so that I understand having made this record, sir, in writing of what had occurred on those events

J. A. Solpietro, for Government, Cross.

then when you were about to be called upon to recite those events you reviewed this particular BND 6 form, is that correct? A. My surveillance report, yes.

Q. Right, and in order to again, talking about almost a year ago, to fully refresh your recollection on these particular events? A. That's right.

Q. And in so reviewing those reports they did in fact provide that purpose for which they had been made, didn't they? A. They did.

Q. And it refreshed your recollection about the events of that evening? A. Yes, sir.

Q. All right. Now, the BND 6 form that we are talking about, is it one form or two? A. If there is two pages the second page is called 6A, a continuation.

Q. I see. In any event, it is one report and one writing that we are talking about? A. Yes. When you have an undercover agent working he does what we call an undercover memo. We do the surveillance memo.

The Court: Does each agent make his own report?

The Witness: No, sir.

The Court: Of what he himself sees or is this,—is it like soup, everybody throws everything in the pot?

The Witness: It's not like soup. Everybody meets. At that time I was the agent that did the surveillance memo and what,—what things happened between what I did and what I saw is filled in by the other agents. We compare things; we get a chronological order the best we can. For example, let's say when Chalmers left I didn't see where he went but it would be included if somebody else saw him leave, things like that.

J. A. Solpietro, for Government, Cross.

By Mr. Doyle:

Q. And incidentally, so that we are clear on that also, these conversations that you overheard from the next room you had made some notes, I take it, on exactly what the conversations were? A. Yes.

Q. And those, again, became part of this composite form that you have told us about, is that correct? A. Yes.

Q. Now, you say in addition to that there was an undercover memo from Chalmers? A. No, sir, Agent McDonald.

Q. From Agent McDonald, I see. In fact, the informant that was working on this matter was Chalmers, isn't that correct? A. Yes.

Q. Did he provide any memo that you know of? A. Not that I know of, no.

Q. Or his recollection concerning the events surrounding this particular arrest were never recorded to the best of your knowledge? A. In this particular case I have to say I don't know but it is customary that we do get a statement from the informant I have done that on numerous occasions.

Q. Do you know whether that was done in this case? A. In this case I don't know. I really don't know.

Q. Do you know whether that was part of this report that you read for the purpose of refreshing your recollection? A. What he said in his statement is not reported in my report.

The Court: Excuse me, Mr. Solpietro, you say "my report." We had Mr. McDonald in here and he said he was the case agent and it was his report. Now, whose report is it?

The Witness: When I say "my report" I am speaking of the surveillance report.

The Court: Is that a separate sheet in there?

The Witness: Yes.

J. A. Solpietro, for Government, Cross.

The Court: Mrs. Srebro do you have this report here in the courtroom?

Mrs. Srebro: Yes, I do. However, I oppose turning it over, if that is what your Honor is driving at.

The Court: All right. Hand it to Mr. White and mark it as a Court Exhibit and I want to look at it and then I will make up my mind about whether we will turn it over.

Mrs. Srebro: The only thing I would like to point out is that Mr. Solpietro testified that he reviewed his surveillance report only for dates and times and not for content.

The Court: I know that but you say you have a surveillance report. Is this a separate sheet in Mr. McDonald's report?

The Witness: Yes, sir. You will find when you look there are two of them. One will be written by him and the report will be undercover negotiations, I think is the title he used, and he will put down on paper what he did undercover. On the same thing, a different sheet of paper on a different report I will put down a surveillance report and I will put down what I saw happening.

The Court: Does each agent do that? Does each agent make a separate report of what he himself did?

The Witness: No, sir. One agent will be assigned the surveillance report. Each agent will contribute notes and comments to the report.

The Court: I know you are not the high fellow up in your agency, Mr. Solpietro and you have nothing to do with policy but I can't think of a sillier way to make reports because nobody could ever use that to refresh their particular recollection of what they

J. A. Solpietro, for Government, Cross.

themselves, and I am speaking of the individual, saw or heard on a particular occasion because if it is mixed in with the reports of all the other agents there is no way after a year passes or two years pass in which a witness could say "this is what I saw", and the other vice to it is that he then after a year passes, would look at the report and believe he saw certain things which are there in the report which he never saw at all. Mr. Doyle, I think no comment is necessary, but continue.

Mr. Doyle: I made none. Your Honor, in light of the fact the Court has ruled it would like to look at the exhibit and in light of this witness's testimony heretofor, it certainly may greatly shorten or may greatly color my cross examination if I can have a ruling on whether or not I can see it.

The Court: Mrs. Srebro, do you have Agent McDonald's whole report?

Mrs. Srebro: Yes, your Honor, I do. I have separated out of that,—they have the report broken down into several areas. One is arrest. Another is what they call a surveillance report. The surveillance report was prepared and signed by Mr. Solpietro, although it does perhaps contain other people,—other things of people on surveillance, Agent Gregg and other agents on surveillance.

The Court: Can we do this, please,—can we mark the whole report as a Court Exhibit.

Mrs. Srebro: The entire report, your Honor.

The Court: Mr. McDonald's entire report. We will mark that as a Court Exhibit. I know your position and I realize that is the Government's position in all these cases and I am going to look at the

Offers of Counsel.

report. Then we will be in recess until 2 o'clock. I may at that time decide that fairness says that this report should be turned over to Mr. Doyle and Mr. Goldberg for cross examination. I have already indicated and I have in the past in other hearings, so far as narcotic agents are concerned, my view as to the failures in this report,—in their reports,—of course, that goes unheeded because Mr. Solpietro certainly isn't making policy here for narcotics, but I think it has come to the point where something must be done in these cases.

Mrs. Srebro: Your Honor, I hope you are not—

The Court: You consult with Mr. Elfvin and Mr. Arcara about my thought here and if you, of course, if you come to the conclusion that it may be turned over,—I may look at it and decide not to turn it over. I am just telling you what I am thinking about, but if at 2 o'clock you are in the position that it should not be turned over, then at that time I think either Mr. Elfvin or Mr. Arcara should be here with you so that we can discuss the matter and determine whether or not we should do a number of things.

One is to give you an opportunity to file a memorandum as to whether this report should not be turned over because, frankly, Mr. Doyle and Mr. Goldberg and the Court are well aware of the rule of Section 3500 and this material does not come within the dictates of 3500. I think that the law ought to be changed but I know that there are cases which stand against my suggestion on that or my thought on that, but I will not turn it over to defense counsel until you have had an opportunity to consult and you have had an opportunity to have your superiors

Offers of Counsel.

in your office think about it and determine what ought to be done. It may be I will decide after I look at it that it will be of no help, assistance or anything else and should not be turned over, so let us mark it now and we will be in recess until 2 o'clock.

(Court Exhibit No. 1 marked for identification.)

The Court: This is what Mr. McDonald has given to you as his complete report, is that right, Mrs. Srebro?

Mrs. Srebro: Yes, your Honor. However, there were some additions, all of which the defense attorneys have.

The Court: Mr. McDonald,—is he here today?

Mrs. Srebro: Yes, he is. Well, he was here this morning. I didn't really,—I don't know whether he is here right now. There were additional items and these would be the waiver of rights which is turned over, signed by Mr. Perdomo.

The Court: All right.

Mrs. Srebro: And the statement taken from Mr. Perdomo. They were not in the original report. The original report that I got I got those from Mr. McDonald at a later time.

The Court: All right.

Mrs. Srebro: And I turned it over to defense counsel.

The Court: There is more trouble with reports, what is the report. Will you check with Mr. McDonald and perhaps Mr. Solpietro, or if they wouldn't know, Mr. Teresi would know whether there are any other reports concerning this particular investigation because sometimes they call them administrative reports and the agent would say "well,

Offers of Counsel.

that is not my report", but it is a report of the agency which perhaps has some information which should be made available.

Mrs. Srebro: Your Honor, I should like to point out to you that I extracted from what I have here marked as Government's Exhibit No. 1, and that is the inventory of the items seized, which also serves as the chemist's report. In other words, I extracted that for this hearing.

The Court: So there is no mistake, Government's Exhibit 1 will be for the present in the custody of the Court as part of Court Exhibit 1.

Mrs. Srebro: You may at this time also wish to have the original of Government Exhibits 5, 6 and 8 which are also a part of this report.

Mr. Goldberg: I am going to object to those exhibits if they are purportedly being offered into evidence.

Mrs. Srebro: They are not being offered in evidence.

The Court: They are not offered in evidence. She just wants to make sure that I have everything. All right. We will be in recess until 2 o'clock.

(Recess taken at 12:25 P.M.)

Proceedings: After recess, 2:50 P.M.

Appearances: As before noted.

The Court: Before we continue with cross examination, at the end of the morning session the Court had an opportunity to examine Court Exhibit 1

Offers of Counsel.

which contained Agent McDonald's report, the special surveillance report of the present witness Mr. Solpietro and other reports or portions of the report of the,—part of the report of Agent McDonald. It appeared to me that in these cases that although, and I have had,—the United States Attorney has called to my attention the case of United States and Covello, decided by the Second Circuit on September 23, 1968, Judge Waterman writing for the Court, Judges Feinberg and Bartels, at page 543 of the decision, they review the District Court action in which he refused upon the defense counsel's request during the pretrial hearing on appellant's motion to suppress evidence obtained through alleged illegal eavesdrop. They wanted to look at the agent's report and Judge Mansfield who was the trial Judge refused to turn it over. I realize that this is the law.

On the other hand, on page 544 the Court goes on to say that,—and continued at 545, that in discussing the Foley case, United States against Foley, 283 F2d 582, the Court in the Covello case points out in Foley the Government sought by mandamus to have us instruct the District Judge to vacate his order providing for a suppression hearing and providing for the production of documents at that hearing. We denied the petition but we read the denial as holding no more, that we left it to the discretion of the trial Judge to order a production of documents. We do not read it to hold as a matter of law that the Jencks Act compels disclosure to defense counsel of the prehearing statements of a witness who testifies at a suppression hearing, so it appears

Offers of Counsel.

to be quite clear that where in the discretion of the District Court Judge fairness says the report should be turned over it ought to be, it should be turned over, although not required to be.

I have looked at the report. As in many other kinds of reports with skilled defense counsel there are some minor differences between what is in his report, maybe as far as the time or statements and so forth and also exactly who said what, where and why, but I find no substantial difference between what the witness has testified to and what is set forth in the report.

I think that here in the past it has not been the practice to turn over these reports. In this particular case I will deny the defense motions, defense counsel motion to have the matter turned over, but I want to make clear, and Mr. Elfvin is here, Mr. Arcara, Mrs. Srebro, to the Government that in future hearings they should have the reports available and be ready at the conclusion of the agent's testimony to make that portion of the report which is his part of the report available. That means, of course, in the Customs Agency reports and in the Narcotic Agency reports which we are dealing with here that in many cases since the report of the agent is all lumped in together under one heading that the entire report would be turned over at the end of the testimony of the first Government witness.

I think we are ready, we can continue with the cross examination of Mr. Solpietro by Mr. Doyle. I refuse to have the report turned over. All right, Mr. Doyle.

Certification.

Mr. Doyle: Your Honor, I must ask the Court so that I can guide myself accordingly for clarification of its ruling. I understand the Court's reading of U. S. vs. Covello as it has been applied to the facts here it is in the Court's discretion as to whether or not to turn these matters over.

I wish to call to the Court's attention, of course, to my request,—it was really double pronged. It was certainly based on the discretion that rests with this Court in connection with 3500 material generally at preliminary hearings but also I had started to embark upon an read of cross examination with reference to the use of this particular material for the purposes of refreshing recollection and got started on that particular cross examination when the Court asked that the U. S. Attorney turn over that matter for in camera inspection. What I am basically asking is it the ruling of this Court that in either event, whether straight 3500 material or material used to refresh the recollection this report will not be turned over to defense counsel, because if so I will discontinue that line of inquiry.

The Court: That is my ruling, Mr. Doyle.

Mr. Doyle: Thank you.

I hereby certify that the foregoing is a correct and accurate transcription of my shorthand notes.

E. F. KNISLEY,
Official Reporter, U. S. District Court.

AFFIDAVIT OF SERVICE BY MAIL

State of New York) RE: U. S. A.
County of Genesee) ss.:
City of Batavia) Anthony James Sebastian et al

I, Roger J. Grazioplene being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 5 day of February, 19 74
I mailed 1 copies of a printed Appendix in
the above case, in a sealed, postpaid wrapper, to:

Stanley J. Collesano, Esq.
76 Niagara Street
Buffalo, New York 14202

George P. Doyle, Esq.
Ellicott Square Building
Buffalo, New York 14203

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

John T. Elfvin, U. S. Attorney

502 U. S. Courthouse, Buffalo, New York 14202

Sworn to before me this

5 day of February, 19 74

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N. Y., Genesee County
My Commission Expires March 30, 1975